

KROGH & DECKER, LLP

SHAWN M. KROGH, SBN 227116
shawnkrogh@kroghdecker.com

MICHAEL D. CRODDY, SBN 198489
michaelcroddy@kroghdecker.com

ÇAĞIL AREL, SBN 333564
cagilarel@kroghdecker.com

555 Capitol Mall, Suite 700
Sacramento, California 95814
916.498.9000 (p)
916.498.9005 (f)

Attorneys for Defendant,
Infinite Energy Home Services, Inc.

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

INFINITY ENERGY, INC., a
California Corporation,
Plaintiff,

v.

INFINITE ENERGY HOME
SERVICES, INC., a California
Corporation,

Defendant.

Case No.
2:21-cv-00438-WBS-KJN
Hon. William B. Shubb

**DEFENDANT'S STATEMENT OF UNDISPUTED
FACTS
IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT,
OR IN THE ALTERNATIVE,
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Date: May 30, 2023
Time: 1:30 p.m.
Location: Courtroom 5

Defendant INFINITE ENERGY HOME SERVICES, Inc. respectfully submits this Statement of Undisputed Facts in support of Defendant's Motion for Summary Judgment, or in the Alternative, Motion for Partial Summary Judgment, as required by Rule 56 of the Federal Rules of Civil Procedure and L.R. 260(a).

All "Def. Ex." References herein are to the Arel Declaration that attaches all relevant evidence. The Exhibits are also identified by shorthand for ease of reference: Kelly is the Person



most Qualified for Plaintiff; Expert Farrell is Plaintiff's Expert Patrick Farrell, and Expert Harper is Defendant's Rebuttal Expert Rhonda Harper.

FACTS NOT IN DISPUTE

Fact	Evidence
1. Plaintiff's mark Infinity Energy is registered under International Class 037 for the installation of Solar energy systems and alternative energy products for residential and commercial use.	Plaintiff's First Amended Complaint ("Am. Compl."), Ex. 1, ¶ 1-3, ECF No. 7; Def.s Ex. A, ¶ 1-3.
2. Plaintiff's mark Infinity Energy is registered as a standard word character mark, and does not claim a particular style, size, font, or color as a feature of the mark.	Pl.'s Am. Compl., Ex. 1, ¶ 5, ECF No. 7; Def. Ex. A
3. On May 26, 2020, USPTO sent an Office Action to Plaintiff that a disclaimer was required for registration.	Def. Ex. P



1 2 3 4	4. The word Energy is disclaimed from Plaintiff's mark Infinity Energy.	Am. Compl., Ex. 1, ¶ 5, Def. Ex. A
5 6 7 8 9 10	5. Plaintiff registered its mark Infinity Energy with the United States Patent and Trademark Office on September 29, 2020.	Am. Compl., Ex. 1, Def. Ex. A
11 12 13 14 15 16	6. The dictionary definition of "Infinity" is unlimited extent of time, space, or quantity.	Def. Ex. B, Dictionary Definition "Infinity" Merriam-Webster.com Dictionary, Merriam-Webster, (Apr. 10, 2023) https://www.merriam-webster.com/dictionary/infinity/ .
17 18 19 20 21 22	7. Plaintiff's Chief Sales Officers, Kelly Cameron, who came up with the name Infinity Energy, believes that the name is not unique.	Def. Ex. D, Deposition of Kelly Cameron ("Kelly Dep.")31:5-7
23 24 25 26 27 28	8. Infinity and Infinite are two separate words; and one is a noun, the other is an adjective.	Def. Ex. B, Dictionary Definition "Infinity" Merriam-Webster.com Dictionary, Merriam-Webster, (Apr. 10, 2023) https://www.merriam-webster.com/dictionary/infinity/



	<p>y/.</p> <p>Def. Ex. C, Dictionary Definition "<i>Infinite</i>" <i>Merriam-Webster.com</i> <i>Dictionary</i>, Merriam-Webster, (Apr. 10, 2023) https://www.merriam-webster.com/dictionary/infinite/.</p> <p>Def. Ex. D, Kelly Dep. 25:17-22</p> <p>Def. Ex. L, Expert Farrell, ¶¶ 12, 13</p>
<p>9. Plaintiff's mark Infinity Energy is associated with getting an infinite supply of energy from the Sun, which is where Solar energy comes from.</p>	<p>Def. Ex. D, Kelly Dep. 31:23-32:3</p> <p>Exhibit T</p>
<p>10. Plaintiff is not the only company who uses Infinity Energy or includes Infinity Energy in their name to provide services in the Solar energy industry.</p>	<p>Def. Ex. E</p> <p>Def. Ex. F</p> <p>Def. Ex. D, Kelly Dep. 36:4 - 37-4;</p> <p>Def. Ex. L, Expert Farrell ¶ 17</p>



11. There are 66 live USPTO trademarks with the word INFINITY in exact or alternative spelling registered under International Class 037.	Def. Ex. E
12. There are 20 live USPTO trademarks with the word INFINITY in exact or alternative spelling for Solar goods or services.	Def. Ex. F
13. There are 841 live USPTO trademarks with the word ENERGY within the Solar industry.	Def. Ex. G
14. Defendant uses the name Infinite Energy or Infinite Energy Home Services to market Defendant's Solar energy services.	Def. Ex. H, p. 3, ll. 27-28 - p. 4, ll. 1
15. Dictionary definition of "Infinite" is extending indefinitely.	Def. Ex. C, Dictionary Definition "Infinite" Merriam-Webster.com Dictionary, Merriam-Webster, (Apr. 10, 2023) https://www.merriam-webster.com/infinite/



16. Plaintiff does not provide any services related to whole house surge protector, replacement or upgrade of windows and doors, HVAC, and outdoor deck installation.	Def. Ex. I, p. 4, ll. 10-11
17. Plaintiff does business in the states of California, Texas, Nevada, Idaho, Florida, Colorado and New Jersey.	Def. Ex. J, p. 10, l. 7; Def. Ex. D, Kelly Dep. 22:19-23:6
18. Defendant does business in El Dorado County, Placer County, and Sacramento County, the State of California.	Def. Ex. K, p. 3 ll. 26-28, p. 4, ll. 1-8
19. Plaintiff's Chief Sales Officer, Cameron Kelly has no direct knowledge of inquiries Plaintiff received from third parties attempting to reach Defendant instead of Plaintiff.	Def. Ex. I, p. 5, ll. 7-19
20. Consumer surveys are important in Lanham Act cases	Def. Ex. M, Expert Harper, ¶ 29



1	involving consumer confusion.	
2	21. Plaintiff did not conduct	Def. Ex. M, Expert Harper, ¶¶
3	any consumer confusion surveys	27, 28, 33, 36
4	regarding Plaintiff's Infinity	Def. Ex. D, Kelly Dep. 33:10-
5	Energy mark in connection with	18
6	this trademark infringement	
7	lawsuit.	
8		
9	22. According to Plaintiff's	Def. Ex. D, Kelly Dep. 56:7-16
10	Person Most Qualified, Cameron	
11	Kelly, Plaintiff failed to track	
12	any communications displaying	
13	customer confusion.	
14		
15	23. Plaintiff's expert Farrell	Def. Ex. L; Expert Farrell, ¶
16	relies on Farrell's personal	¶ 18 - 24
17	computer search in an attempt to	Def. Ex. M, Expert Harper, ¶ ¶
18	show actual consumer confusion	42, 44
19	in Farrell's expert report about	
20	consumer confusion between	
21	Plaintiff and Defendant.	
22		
23	24. Plaintiff's expert Farrell	Def. Ex. L, Expert Farrell ¶
24	believes the words Infinite and	12-14
25	Infinity are similar.	
26		
27		
28		



25. Plaintiff's expert opinion
relies on a cropped section of
the FinanceGuru Post that
isolates the term "Infinity"
from the overall post which uses
the term "Infinite" 12 times
about a Florida based company
Infinite Energy as evidence of
customer's being confused.

Def. Ex. L; Expert Farrell,
¶ 24;

Def. Ex. M, Expert Harper,
¶ 45

26. Plaintiff's expert opinion
relies on a 2015 webpage with
testimonials for an Australian
company named Infinite Energy on
which two users use Infinity
instead of Infinite to refer to
the Australian company
references customer's being
confused.

Def. Ex. L; Expert Farrell,
¶ 22;

Def. Ex. M, Expert Harper,
¶ 46

27. Plaintiff's expert
Farrell's expert report does not
define or analyze the relevant
marketplace and consumers.

Def. Ex. M, Expert Harper, ¶ ¶
38, 41

28. Plaintiff's expert

Def. Ex. M, Expert Harper, ¶ ¶



1	Farrell's expert report does not	33 - 36
2	contain a likelihood of	
3	confusion survey or polling	
4	among consumers.	
5		
6	29. Search result listings are	Def. Ex. M, Expert Harper, ¶ ¶
7	not evidence of people actually	40-44
8	being confused.	
9		
10	30. Plaintiff uses the	Def. Ex. N
11	following website to market its	
12	Solar energy services:	
13	"https://infinityenergy.com/"	
14		
15	31. Defendant uses the	Def. Ex. O
16	following website to market its	
17	services,	
18	"https://www.infiniteenergyco.co	
19	m/"	
20		
21	32. Defendant used the name	Def. Ex. H, p. 5, ll. 13-17
22	Infinity Energy at some point	
23	from 2014 to present.	
24		
25	33. Defendant received revenue	Def. Ex. H, p. 5, ll. 8-12
26	from customers while utilizing	
27	the name Infinity Energy.	
28		



34. Plaintiff's designated Plaintiff's Chief Sales Officer Cameron Kelly as the person most qualified to speak as to the facts and circumstances concerning the allegations Plaintiff ("PMQ") made in Plaintiff's First Amended Complaint.

Def. Ex. D, Kelly Depo. 3:10-12; 18:8 - 19:9

35. Plaintiff's PMQ is the most qualified person to speak as to insides sales, including internal marketing sales channel, which are the mostly impacted sales channels and have the most issues.

Def. Ex. D, Kelly Depo. 18:13 - 19:9


36. Plaintiff's Chief Sales Officer Cameron Kelly has been Plaintiff's Chief Sales Officer since Plaintiff's inception in 2014.

Def. Exh. 5, Kelly Depo. 13:14-19

37. Plaintiff provides consumers with information about

Def. Ex. Q



1	Plaintiff's services.	
2	38. Plaintiff's consumers can	Def. Ex. Q
3	enter into a power purchase	Def. Ex. R
4	agreement, solar lease	
5	agreement, or a loan agreement	
6	with Plaintiff.	
7		
8	39. Plaintiff's Banner says	Def. Ex. T
9	"There's never a shortage of	
10	solar energy."	
11		
12	40. Defendant's Chief Executive	Def. Ex. S
13	Officer is Richard Walton	
14		
15	41. Plaintiff amended the	Def. Ex. U
16	servicemark to disclaim the word	
17	Energy.	
18		
19	42. The marketplace appearance	Def. Ex. N
20	of Plaintiff's service mark is:	
21		
22		
23		
24		
25	43. The marketplace appearance	Def. Ex. V
26	of Defendant's tradename is:	
27		
28		



44. Plaintiff's received an email from a third party which mentions "Rich"

Def. Ex. W

45. Plaintiff's solar energy services have an average installation time of 6-8 weeks.

Def. Ex. X

46. Plaintiff provides consultation to potential buyers.

Def. Ex. Q, pg. 2

47. As Plaintiff PMQ as the facts and circumstances concerning the allegations Plaintiff made in Plaintiff's First Amended Complaint said he can only make assumptions about Defendant's intent and knowledge. He does not know

Def. Ex. D., Kelly Depp. 68:1 - 69:13)

1 anyone at Plaintiff who knows
2 Defendant's conduct is willful.

3
4
5
6 DATED: APRIL 24, 2023

KROGH & DECKER, LLP

7
8 By: /cagil arel/

9 CAGIL AREL
10 Attorney for Defendant,
11 Infinite Energy Home Services,
12 Inc.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

